Supreme Court, U.S.
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No. 10-669

IN THE

# Supreme Court of the United States

WYETH PHARMACEUTICALS, INC.,

*Petitioner,*

*v.*

HOWARD HENRY,

*Respondent.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

## REPLY BRIEF FOR PETITIONER

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## PETITIONER'S REPLY BRIEF

In his Brief in Opposition to the Petition for Writ of *Certiorari*, Henry argues that Wyeth's petition should be denied because this case is different from *Staub v. Proctor Hospital*, 09-400, in three material respects, and therefore, this Court's decision in *Staub* should have no bearing on this case.

As explained below, this case is not distinguishable from *Staub* in any material respect, and Henry has failed to explain why this Court's ultimate decision in *Staub* would not apply to this case.

Henry first argues that *Staub* is materially different from this case because, in *Staub*, the individual with discriminatory animus was a subordinate employee to the ultimate non-discriminatory decision maker, while, in this case, the individuals with the alleged retaliatory animus (Vitanza and Rose) were superior employees to the ultimate non-retaliatory decision makers (Espejo and Katz). This argument must fail for several reasons.

First, this argument must fail because it is not supported by the record in this case. The Second Circuit did not view Vitanza as an individual with retaliatory animus who ordered or influenced the employment decisions made by Espejo or Katz. Instead, the Second Circuit found that "Henry introduced evidence that might have prompted a jury to believe that Espejo and Katz were acting under orders, or at least encouragement, explicit or implicit, from ***Rose*** to retaliate against Henry." Pet.

App. 25a. In its decision, the Second Circuit referred to Vitanza's request that Espejo review his documentation of Henry's work with Rose as evidence suggesting that Espejo and Katz were acting under encouragement from ***Rose*** to retaliate against Henry, not evidence that Espejo and Katz were acting under encouragement from ***Vitanza*** to retaliate against Henry. *Id.* Thus, Henry's suggestion that Vitanza was a superior employee encouraging Espejo and Katz to retaliate against Henry should be disregarded by this Court. Moreover, contrary to Henry's argument, Rose was not a "superior" to Espejo or Katz, but instead was a Wyeth Human Resources representative who was responsible for providing advice and support to Wyeth managers such as Espejo and Katz relating to personnel issues. Thus, Henry's reference to Rose as a superior similarly should be disregarded by this Court as having no support in the record below.

In any event, even assuming Vitanza and Rose were individuals who harbored a retaliatory animus against Henry and were superiors to Espejo and Katz (which Wyeth denies), the fact that they were superiors to Espejo and Katz is not relevant. The Seventh Circuit and other Circuits have not limited the application of the cat's paw theory of liability to those situations where a subordinate influences the decision of a superior employee. Nor has Henry articulated any reason why its application should be so limited and there is no logical reason to make such a distinction. Moreover, there is no reason to believe that this Court's ultimate decision in *Staub* will apply only to cases where a subordinate employee with a discriminatory or retaliatory

animus influences the decision of a superior employee, particularly given the broad question presented in the petition for writ of *certiorari* in *Staub*: "In what circumstances may an employer be held liable based on the unlawful intent of officials who caused or influenced but did not make the ultimate employment decision." Brief for Petitioner, *Staub v. Proctor*, No. 09-400, at page i (question presented).

Henry's second argument that this case is distinguishable from *Staub* because Espejo did not conduct the same type of independent analyses of Henry's performance as the non-discriminatory decision maker in *Staub* is entirely misplaced. First, the argument assumes that this Court will adopt the same cat's paw standard that the Seventh Circuit applied in *Staub*, which may not occur. Second, even if this Court were to adopt the same standard as the Seventh Circuit in *Staub*, Henry still would have to demonstrate that Rose exercised such "singular influence" over Espejo that Rose was basically the real decision maker, regardless of whether Espejo conducted an independent inquiry. Henry could not satisfy this "singular influence" standard here, and therefore, there would be no need to consider whether Espejo had conducted an independent inquiry of Henry's performance. Finally, Henry's argument is misplaced because Espejo was not the final decision maker with respect to Henry's 2005 midyear evaluation and the PIP, but instead only suggested to Katz that Henry be placed on the PIP, given his performance problems. Katz, as Henry's direct supervisor, had direct knowledge of Henry's performance problems, and therefore, there

was no need for either Katz or Espejo to perform an independent investigation of Henry's performance. Significantly, neither Katz nor Espejo had any knowledge that Henry had engaged in any protected activity.

Finally, Henry's attempt to distinguish this case from *Staub* based on the fact that *Staub* involves a claim of discrimination and this case involves a claim of retaliation also must fail. Henry contends that, unlike with a claim of discrimination, a plaintiff may satisfy his ultimate burden of proving retaliation, not only by utilizing the cat's paw theory of liability, but also by demonstrating a close temporal proximity between his complaints of discrimination and the adverse employment actions that followed. Henry argues that, even if the Second Circuit erred in applying the cat's paw theory of liability in connection with its decision to reject Wyeth's harmless error argument, he still could prove his retaliation claims by showing a close temporal proximity between his complaints of discrimination and the adverse employment actions.

Contrary to Henry's suggestion, he cannot satisfy his ultimate burden of proving unlawful retaliation merely by pointing to the close temporal proximity between his complaints of discrimination and the adverse employment actions. Such a close temporal proximity may be sufficient to satisfy the causation requirement of his *prima facie* case – not his ultimate burden of proving retaliation. *See* Pet. App. 24a. Thus, this argument does not provide any independent basis for overcoming Wyeth's harmless error argument. In any event, the Second Circuit rejected Wyeth's harmless error argument with

respect to the jury instruction based on the cat's paw theory of liability, not based solely upon the temporal proximity between Henry's complaints of discrimination and the adverse employment actions. *See* Pet. App. 25a. Therefore, Henry's final attempt to distinguish this case from *Staub* in any meaningful way also must fail.

## CONCLUSION

For the foregoing reasons and the reasons set forth in Wyeth's petition, the petition should be granted, the judgment below vacated, and the case remanded to the Court of Appeals for the Second Circuit for further consideration in light of this Court's decision in *Staub*.

Respectfully submitted,

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